# In the Supreme Court of the United States

OCTOBER TERM, 1963

---

No. 710

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT

*v.*

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN*

---

## MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

---

The United States and Interstate Commerce Commission believe that the decision below is erroneous. The government did not appeal because, in its view, the decision was not sufficiently important to warrant seeking review in this Court. This was so, we concluded, because the amount of traffic which is subjected to the possibility of diversion as a result of the

decision below is relatively insignificant in volume. Another party having appealed, however, we deem it appropriate to advise the Court of our view of the merits.

In October 1957, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee") and the Lake Superior and Ishpeming Railroad Company ("Ishpeming") constructed, near Republic, Michigan, a 262-foot track connecting their main lines at a point where they run parallel to each other; they also constructed two interchange tracks parallel to and connecting with the Ishpeming main line, which are used in the transfer of cars from one main line to the other. The total cost of construction was $28,690, which was shared equally by the two railroads. Upon completion of this construction, the Milwaukee and Ishpeming filed tariffs establishing through routes and joint rates on various commodities over their lines via these tracks. The principal use of this junction has been to provide through routing for carriage of saw logs and chemical wood from Sunrise Landing, Michigan, served only by Ishpeming, to Amasa and Iron Mountain, Michigan, which are served by the Milwaukee and other railroads. Prior to this connection, these shipments could move from Sunrise Landing to Amasa or Iron Mountain only on the through route provided by the Ishpeming and the Chicago and North Western Railway ("North Western"). From a different loading point, about 15 miles from Sunrise Landing, the goods could move via the Duluth, South Shore and Atlantic Railroad Co. ("Duluth") and the

Milwaukee. Before the crossover was laid, there was no through route service via the Ishpeming and the Milwaukee available to these towns.

On January 3, 1958, the Duluth filed a complaint with the Interstate Commerce Commission, alleging that the Milwaukee and Ishpeming, by constructing the connecting trackage without obtaining a certificate of public convenience and necessity, had violated Section 1(18), 49 U.S.C. 1(18) of the Interstate Commerce Act.[1] The Commission (Division 4) found that the trackage "is the sole means by which traffic that would otherwise move over other routes via other carriers may be obtained by defendants" (J.S. 48) and ruled that the tracks were "not mere 'switching tracks' utilized for loading, reloading, storing, and switching the cars and for other things merely incidental to the regular train haul, but are, in fact, 'extensions' of the lines of both defendants bringing them within the provisions of section 1(18) of the

---

[1] Title 49 U.S.C.

§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *.

act" (J.S. 48).[2]

On appeal, a three-judge district court reversed, ruling that the Commission had no jurisdiction over the cross-over track because it was not an "extension of lines" but a "switching track", and hence exempt from the regulatory powers of the Commission under Section 1(22) 49 U.S.C. 1(22).[3] The court reasoned

[2] Ishpeming and Milwaukee, in order to protect themselves if they lost on the jurisdictional issue, filed an application for a certificate of public convenience and necessity under Section 5(2) for construction and joint use of the connecting tracks. The Duluth and Northwestern intervened in opposition to the application. The Commission considered this application and the complaint in a consolidated proceeding. In its decision, the Commission also refused to issue the certificate because of the adequacy of existing service and other factors (J.S. 65-66). The district court did not reach the issue of the correctness of this ruling.

On the basis of its decision, the Commission entered a cease-and-desist order prohibiting further use of the cross-over. Subsequently, the Commission withdrew this order, having concluded that the only appropriate remedy was a court injunction under Section 1(20). This action did not moot the instant case, since the Commission's decision that the crossover was within its jurisdiction, and required authorization as an "extention", was an essential element of its adverse ruling on the application by the Ishpeming and the Milwaukee for a certificate of public convenience and necessity.

[3] Section 1(22) provides:

> *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

that the trackage was not an "invasion" into new territory within the doctrine of *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and S.F. Ry Co.*, 270 U.S. 266, because it was of relatively insignificant length and did not extend into territory served by other railroads, even though through routing was made possible. The court also suggested that the trackage was not an extension because the carriers did not offer any of the services or facilities usually offered on a line, such as express, passenger or mail service, and loading platforms.

We believe the court below adopted an unduly narrow view of what constitutes "an extension of line of railroads requiring certification." In *Texas & Pacific Ry Co., supra*, this Court stated that "where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U.S. at 278).

The primary purpose of the trackage here involved is to connect the lines of two previously unconnected railroads and to enable them to pass cars from one line to the other as part of an "actual transportation haul from the shipper to the consignee"; the arrangement is not "for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul" (*Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540, 547 (E.D. Mich.)). The competitive impact of a new connection cannot be determined from its length. Although substantial amounts of traffic are not at stake here, the result of this short connecting track is to make available to the Ispheming and Milwaukee shipments which formerly had been transported by other railroads.[4] As the Commission found, "the creation of the connection enabled both defendants to compete for traffic in territories not previously served by them and which were theretofore adequately served by other carriers" (J.S. 49). In our view, an invasion of territory within the meaning of *Texas & Pacific* is established when a carrier constructs new trackage which enables it to divert traffic from other carriers previously authorized to transport it. *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga).

[4] The disputed trackage enables the Milwaukee, for the first time, to compete for traffic originating at Sunrise Landing. The new through-route via the Milwaukee gives the Ishpeming a langer haul than on its prior through-route via the Northwestern, thereby increasing its revenues.

If the new line has this effect (as seems plain), it is not exempt from the Commission's jurisdiction merely because it is not constructed in the same area where the adversely affected carriers have their tracks.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

WILLIAM H. ORRICK, JR.,
*Assistant Attorney General.*

LIONEL KESTENBAUM,
I. DANIEL STEWART, JR.,
*Attorneys.*

ROBERT W. GINNANE,
*General Counsel,*

ARTHUR CERRA,
*Assistant General Counsel,*

*Interstate Commerce Commission.*

JANUARY 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 718991 639